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In The

Supreme Court of the United States

October Term, 1993

MORGAN STANLEY & CO., INC.,
GOLDMAN SACHS & CO., ERNST & YOUNG,
SALOMON BROTHERS, INC.,

Petitioners,

v.

PACIFIC MUTUAL LIFE INSURANCE CO.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

NASCAT is an association of law firms consisting of attorneys located throughout the United States. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States' securities markets operate freely and efficiently. NASCAT's members frequently represent plaintiffs in a variety of individual and class action cases prosecuted under the federal securities laws.[1] NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetuating securities fraud upon investors in this country.

Specifically with respect to NASCAT's interest in the constitutionality of Section 27A of the Securities Exchange Act, NASCAT's members represent many thousands of plaintiffs with billions of dollars of claims for securities fraud (and in some cases multimillion district court judgments on those claims), whose claims, although timely when filed, were placed in jeopardy by retroactive application of the new statute of limitations for Section 10(b) actions announced in this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991). Congress' enactment of Section 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991), was designed to alleviate the unfairness to those plaintiffs – who had properly

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[1] NASCAT members also have represented defendants in securities litigation and in other complex cases.

relied on the statutes of limitations in place when they filed their claims – caused by the retroactive application of the new *Lampf* rule and to prevent a windfall to culpable parties who defrauded those plaintiffs.

SUMMARY OF ARGUMENT

This Court's statutory interpretation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.*, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), announcing a uniform federal limitations period for claims brought under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), changed decades of well-established law in most circuits. This Court's holding in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), that a new rule of statutory interpretation applied to the litigants before this Court must be applied to all pending cases, since making decisions about selective prospectivity is not the proper role of courts, led to retroactive application of the new *Lampf* rule. That retroactive application caused widespread unfairness and serious injustice.

Hundreds of thousands of victims of securities fraud who had previously filed legitimate claims in proper reliance on the then-existing statutes of limitations were placed in jeopardy of losing their claims, whose aggregate value exceeded four and one-half billion dollars. Many culpable persons who had defrauded those victims were given the unexpected opportunity to be relieved of well-deserved liability. After consulting with constituents and conducting hearings, Congress enacted legislation,

an amendment to the Securities Exchange Act, relieving the unfairness and correcting the injustice by restoring the status quo prior to the *Lampf* decision for cases pending the day the *Lampf* decision was decided.

Petitioners concede that the legislation Congress enacted, Section 27A, is constitutional with respect to cases that were still pending in the judicial system as of the date of enactment of the legislation.[2] Petitioners contend, however, that Congress is without power to relieve the unfairness and prevent the injustice with respect to cases where a "final,"[3] non-appealable judgment was entered between the date of the *Lampf* decision in June, 1991, and the date of the enactment of Section 27A in December, 1991.

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[2] The seven circuit courts that have reviewed that issue have unanimously held that Section 27A is constitutional with respect to cases that were pending in the judicial system as of the date of the enactment of the legislation. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569 (9th Cir. 1993); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir.), *reh'g granted in part*, 977 F.2d 1549 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1841, 123 L. Ed. 2d 467 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575 (11th Cir. 1992); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co.*, 993 F.2d 269, 273 & n.11 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 278-79 (7th Cir. 1993); *Axel Johnson, Inc. v. Arthur-Anderson & Co.*, 6 F.3d 78 (2d Cir. 1993).

[3] A judicial decision is only "final" if judgment "has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Cases in which judgments are not "final" are "pending."

The rule defendants propose – that Congress may not constitutionally enact legislation assisting unfairly disadvantaged persons because they had the misfortune to have district judges who ruled promptly and because they correctly believed that filing an appeal would have been pointless under then existing law – would be unfair and counterproductive. Such a rule ignores the reality that it takes Congress some time, more than the length of an appeal period, to enact legislation providing transitional rules for new judicial announcements. Such a rule also would create the wrong incentives, since it would encourage people to file frivolous appeals. Most important, such an intrusion on Congressional authority is not grounded in the Constitution or the decisions of this Court.

Contrary to Petitioners' contentions, final judgments are not sacrosanct. This Court has expressly upheld as constitutional federal and state statutes that have divested litigants of final judgments. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 374 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899); *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856).

Separation-of-powers principles are not violated when, as here, Congress is performing legislative functions, not judicial functions. When amending the Securities Exchange Act to add Section 27A(b), Congress was not sitting as a court of errors or directing the outcome of a particular case. Instead, Congress was performing a traditional legislative function by revising the nation's statutory law. Section 27A(b)'s enactment was a proper

exercise of Congress' legislative power under Article I of the Constitution.

Petitioners' due process argument also fails. The transitory windfall Petitioners and other similarly situated defendants received as a result of the retroactive application of the *Lampf* rule did not create "fundamental rights." Accordingly, Congress had the right to enact legislation affecting those interests, so long as the legislation enacted was rationally related to a legitimate goal. Section 27A(b) easily passes that test; the legislation was not only rational, but a fair and just legislative solution to a compelling need.

Invalidating Section 27A(b) would prevent Congress from helping persons with legitimate claims who lost those claims through no fault of their own. Even more important, striking down this Act of Congress when there is no sound constitutional basis for so doing would improperly shift the balance of powers in our system of government away from Congress, leaving no branch of government with the authority to provide for the transitional rules needed to temper the inequities that are sometimes caused by retroactive application of a new judicial rule.

Accordingly, this Court should affirm the Fifth Circuit, and uphold Section 27A(b) as constitutional.

ARGUMENT

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION-OF-POWERS DOCTRINE.

A. Section 27A(b) Was A Proper, And Indeed Essential, Exercise Of Congress' Authority Under Article I.

Article I of the United States Constitution vests all legislative powers in Congress. U.S. Const., art. I, § 1. That power includes the power to alter statutes of limitation, which this Court described in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982), as rules " 'good only by legislative grace . . . subject to a relatively large degree of legislative control' " (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

Pursuant to its power to regulate interstate commerce, U.S. Const., art. I, § 8, Congress enacted the Securities Exchange Act. Acting within its constitutional legislative authority, Congress amended the Securities Exchange Act, by enacting Section 27A, to create statutes of limitation for Section 10(b) claims pending on June 19, 1991.

1. Section 27A(b) Modified The Nation's Statutory Law To Relieve Unfairness To Victims Who Properly Relied On Existing Statutes Of Limitation And To Prevent An Unjust Windfall To Culpable Parties.

Retroactive application of the new statute of limitation announced in *Lampf* had a devastating impact nationwide. Over four and one-half billion dollars worth of claims that had been timely when filed were dismissed

pursuant to retroactive application of the new *Lampf* rule. *See Securities Investors Legal Rights: Hearing On H.R. 3185 Before the Telecommunications and Finance Subcomm. of the House Comm. on Energy and Commerce*, 102nd Cong., 1st Sess. 3-6 (Nov. 21, 1991) (estimating $4.578 billion worth of claims dismissed). As Senator Bryan emphasized when legislation addressing *Lampf* retroactively was introduced in the Senate, "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending." 137 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Retroactive application of the new *Lampf* rule to all Section 10(b) claims pending when *Lampf* was decided would have resulted in the dismissal of the valid claims of thousands against many serious wrongdoers, including Michael Milken and Charles Keating. *See* 137 Cong. Rec. S17356 (daily ed. Nov. 21, 1991) (Sen. Domenici); *see also Securities Investor Protection Act of 1991: Hearing on S.1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102nd Cong., 1st Sess. 1-2 (Oct. 2, 1991). Hundreds of thousands of plaintiffs were placed in jeopardy of forfeiting legitimate claims through no fault of their own.

Thousands of these investors lost their life savings as the proximate result of unscrupulous conduct. *See, e.g., In re American Continental Corp./Lincoln Savings and Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992) (describing conduct of the defendants in the *Lincoln Savings* case). The securities laws gave these individuals an opportunity for redress. Retroactive application of the *Lampf* decision took that opportunity away. Congress enacted Section 27A to restore that opportunity, to prevent manifest unfairness, and to correct injustice.

2. *Beam* Makes Clear That Congress Must Have The Authority To Enact Transitional Rules Required By New Judicial Statutory Interpretations.

In *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), this Court held that Courts must apply the law as they find it to pending cases. After *Beam*, Courts no longer have the discretion to provide transitional rules for new judicial interpretations of statutes applied in regular judicial course to the litigants before the Court. Courts are obliged to apply such new interpretations to all pending cases, regardless of whether that causes inequities.

New judicial rules may well cause inequitable results when applied retroactively. *See generally Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Lampf, Pleva*, 111 S. Ct. at 2785-88 (1991) (O'Connor, J., dissenting). Under the Constitution, the Executive does not have the authority to address these inequities. After *Beam*, courts do not either.

Congress, the branch of the Government vested with legislative power, is the proper – and, after *Beam*, perhaps only[4] – source of such transitional rules. U.S. Const., art. I. Congress is well-suited to make the policy decisions necessary to provide for the transition between judicial rules. It has investigatory, policy making, and line drawing abilities that the judicial branch lacks. Analyzing the policy implications of new judicial rules and enacting

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[4] In *Beam*, this Court did not render a decision regarding "the bounds or propriety of pure prospectivity." 111 S. Ct. at 2448 (Souter, J.).

legislation that provides for the unanticipated impact of such rules is a normal and appropriate legislative function.[5]

The same reasons that made this Court conclude in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), that on some occasions retrospective application of a new rule is not appropriate, establish the need for some government body to have the authority to decide that new rules will not always have full retroactive application. If the judiciary is without authority to deviate from a rule of complete retroactivity, fairness and effective operation of government demand that the authority to temper such a rule be vested elsewhere in government. *See generally General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992).

Accordingly, Section 27A's enactment in response to the new judicial interpretation announced in *Lampf* was not only proper, but essential. If, as Petitioners propose, Congress is deprived of the ability to enact transitional rules, and if, after *Beam*, courts cannot provide them, inequities caused by new judicial rules will be not only inevitable, but also irremediable. No branch of government will have the authority to enact tempering transitional rules.

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[5] For example, when this Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), Congress saved municipalities from paying huge amounts in back overtime due under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* by amending the FLSA to provide that municipalities were exempt from compliance under the FLSA until after the date of the amendment. Act of Nov. 13, 1985, Pub. L. No. 99-150, 99 Stat. 787.

Petitioners might respond by arguing that Section 27A is constitutional in large part, and that Congress may enact transitional rules for all cases except those where final judgments are entered. But such an argument would ignore the nature of the legislative process. Congress must collect information and reach consensus before it acts. Accordingly, it rarely acts quickly. Indeed, the enactment of Section 27A in response to *Lampf* was relatively speedy. Unless courts stay all proceedings between the time a new judicial rule of statutory interpretation is announced and the time Congress acts in response – an impossibility both because the Court system would ground to a halt and because there is no way of knowing whether Congress will choose to act in response – or unless the rule Petitioners propose causes all parties always to file appeals, regardless of whether the appeals are meritorious, in the hope that the law will change – an undesirable result – some final judgments will always be entered. Preventing Congress from enacting transitional rules applicable to the cases where those judgments are entered would prevent Congress from performing a necessary constitutional function that only it is authorized to perform.

B. Section 27A(b) Does Not Violate The Principle In *Hayburn's Case* Or Other Separation-Of-Powers Principles.

Petitioners repeatedly emphasize the importance of "final judgments" to the independence of the judiciary. But "final judgments" are not sacrosanct. This Court has expressly upheld legislation reopening final judgments: *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980);

Fleming v. Rhodes, 331 U.S. 100, 107 (1947); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 374 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899); *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856).

Nothing in the Constitution forbids Congress from affecting final judgments by changing the applicable law, provided that Congress does not usurp adjudicative functions by "sit[ting] as a court of errors" to review those judgments. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792).[6]

When enacting Section 27A, Congress was not passing on the correctness of judicial decisions under existing law. Instead, Congress was properly exercising its legislative authority under Article I to modify this nation's statutory law.

The legislation enacting Section 27A expressly provided that "[t]he Securities Exchange Act of 1934 is amended." F.D.I.C. Improvement Act of 1991, Pub. L. No.

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[6] The rule defendants propose – distinguishing between those cases which happened to be pending because the particular district court judge was slow to apply *Lampf* retroactively or because the attorneys for the plaintiffs chose, for whatever reasons, to file an appeal – would place form over substance. If Section 27A does not offend separation of power principles as to "pending cases" since it is "legislation," not "adjudication," as seven circuits have unanimously held and Petitioners concede, *see* cases cited in n.2, *supra*; Pet. Brf. at 22, it is hard to fathom how that same legislation is adjudication when addressed toward cases where no appeal was filed.

This rule based on form, not substance, would be arbitrary and unfair. It would also create the wrong incentives, since it would encourage frivolous appeals.

102-232, § 476, 105 Stat. 2387. Section 27A modifies that Act by expressly providing a limitation period for certain claims. Whereas on June 19, 1991, *i.e.*, the day before this Court issued the *Lampf* decision, the Securities Exchange Act was silent on the issue of the limitation period for Section 10(b) claims, and whereas from June 20, 1991 through December 19, 1991, the judicially created *Lampf* rule governed, the Securities Exchange Act now specifies limitation periods for claims pending on June 19, 1991. Section 27A thus simply amended existing law, a traditional legislative function. *See Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992).

Section 27A(b) does not have the attributes of adjudication; it has attributes of legislation. Section 27A(b) does not direct any court to reach a particular outcome. Section 27A(b) leaves the task of fact finding and application of the law to facts to the judiciary. Congress has simply changed the law to which the facts must be applied. At most, Section 27A(b) makes unavailable to Petitioners a specific procedural device, without directing the outcome of the action. This Court upheld the constitutionality of similar legislation against a separation-of-powers attack in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In *Sioux Nation*, Congress enacted legislation withdrawing a *res judicata* defense in a case involving an Indian treaty. This Court rejected an argument that the legislation was unconstitutional under the separation-of-powers principles, ruling that "Congress made no effort . . . to control the Court of Claims' ultimate decision of

that claim . . . "[7] Similarly, in the case of Section 27A(b), the ultimate decision on the relevant claims will be made by the courts, not by Congress.

Petitioners argue that "even if one were to entertain the possibility that 'new law' may be interposed to reopen final judgments, Section 27A(b) is not 'legislative' in any meaningful sense" since it has no prospective effect. (Pets. Brf. at 26-27). The argument that Section 27A is not "legislative" because it has no prospective effect has been soundly rejected by the Circuit Courts to address that issue.[8]

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[7] Petitioners attempt to distinguish *Sioux Nation* by asserting that the *Sioux Nation* decision simply involved a decision by the United States to waive the defense of *res judicata*. That attempted distinction is not persuasive, however, in the context of the separation-of-powers issue. Because the separation-of-powers doctrine protects the integrity of the constitutional structure, a violation of the separation-of-powers doctrine cannot be waived by the parties to the litigation. Because legislation invalid under the separation-of-powers doctrine cannot be validated by waiver of the parties, the fact that the United States was a party to the *Sioux Nation* litigation was irrelevant to the court's conclusion that the legislation survived separation-of-powers analysis. At the very minimum, this Court's statement in *Sioux Nation* that "Congress made no effort . . . to control the Court of Claims' ultimate decision of that claim," *Sioux Nation*, 488 U.S. at 405, must be viewed as an alternative holding on the separation-of-powers issue.

[8] *See, e.g., Henderson v. Scientific-Atlanta*, 971 F.2d at 1573: *Scientific* attempts to distinguish *Audubon* on the ground that the Compromise in that case had both retroactive and prospective effect whereas Section 27A has only a retroactive effect. *See* Appellee's Supplemental Brief at 7-8. We fail to see the significance of such a distinction. The central issue is whether

Petitioners have cited no appellate case, and can cite no appellate case, that has invalidated an act of Congress on separation-of-powers grounds because the legislation at issue affected pending cases without having a prospective effect. Indeed, the most recent opinion of this Court touching on separation-of-powers issues, *Robertson v. Seattle Audubon Society*, upheld legislation that had extremely narrow prospective effect and admittedly was enacted "in response to . . . ongoing litigation." 112 S. Ct. at 1410. The legislation at issue in *Robertson v. Seattle Audubon Society* was manifestly directed at specific pending cases, and even identified those cases by docket number and caption. *See* 112 S. Ct. at 1411. Although the legislation at issue theoretically had certain prospective effect, it was limited in geography to the site of the pending cases, and by its terms would expire within a few months of its passage. *Id.* at 1410-11. To say that the limited theoretical prospective effect of that legislation is what made that legislation constitutional, is to elevate form over substance.

Moreover, in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) this Court upheld legislation with no prospective effect. The enactment at issue in *Sioux Nation* operated solely on one pending lawsuit. It provided that the court of claims would review the merits of the *Sioux*

> Section 27A violates separation of powers principles by interfering with judicial decision-making. The presence of an additional prospective effect in no way lessens such interference if it exists at all. Accordingly, we conclude that *Audubon* is controlling in this case.

See also Gray v. First Winthrop, 989 F.2d at 1570.

Nation's claims, without regard to the defense of *res judicata* or collateral estoppel. The legislation had no prospective effect, yet this Court upheld the statute against a separation-of-powers challenge.[9]

Petitioners also argue that "[u]nlike a change in law applicable to pending and future cases, *which is inherently 'legislative'* in nature, the enactment of a statute such as Section 27A(b) for the *sole purpose* of reopening closed cases between private parties is a judicial – not legislative – function beyond the purview of Congress." (Pets. Brf. at 22 (emphasis added).) That argument is premised on a faulty reading of Section 27A(b). Section 27A(b) applies to any "private civil action implied under Section 78j(b) of this title that was commenced on or before June 19, 1991 – (1) *which was dismissed as time barred . . . .* " 15 U.S.C. § 78aa-1(b) (emphasis added). That language covers not only the cases in which a "final" judgment was issued, but also those cases that were "dismissed" by the District Court but were still "pending" in the Court system because a notice of appeal was filed.

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[9] To be sure, retroactive legislation must survive constitutional scrutiny, but that scrutiny is the rational basis review applied under the due process clause, *see Pension Benefit Guaranty Corp v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), which Section 27A(b) easily passes, *see* Section II.C., *infra*.

As the Fifth Circuit notes, "While the Constitution proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. Const. art. I, § 9." *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39, 45 (5th Cir. 1993), *cert. granted sub nom. Morgan Stanley & Co., Inc. v. Pacific Mutual Life Insurance Co.*, 114 S. Ct. 680 (1994).

Section 27A(b) was legislation that modified existing statutory law to provide a transitional rule for a new judicial rule. Its enactment was not an instance of Congress "sit[ting] as a court of errors" overturning decisions it did not like without changing the underlying law.[10] *Cf Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). Because Section 27A(b) involves legislation, not adjudication, it does not violate separation-of-powers principles.[11]

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Windfall Petitioners And Others Received From *Lampf*'s Retroactive Application Did Not Create A "Fundamental" Right Immune From Legislation Except Upon A Showing Of Compelling Need Surviving Heightened Scrutiny.

Congress has the power to adopt new statutes of limitations that apply retroactively as well as prospectively. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885). The fact that legislation revives claims that were previously adjudicated by a trial court to be time barred in no way

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[10] The statutes upheld in *Sioux Nations* and *Robertson* were far more directly aimed at particular cases than is Section 27A(b).

[11] Petitioners' concern that reopening final judgments would render them "advisory opinions" (Pets. Brf. at 23) is unfounded. Since the cases involved "cases and controversies" between opposing parties when the opinions were rendered, U.S. Const. art. III, the opinions were not advisory when rendered. Subsequent changes in the law do not render opinions advisory.

undermines the constitutionality of the legislation. In *Chase Securities*, this Court upheld as constitutional state legislation amending a limitation period for a state securities claim and reviving securities claims previously adjudicated to be time barred. *See also International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (Congress had the constitutional power to extend the period for filing discriminatory charges with the EEOC and to apply the longer period retroactively to revive charges that would otherwise have been time barred).

As this Court explained in *Chase Securities*, the protection provided by a statute of limitations "has never been regarded as what is now called a 'fundamental' right." 325 U.S. at 314. Legislatures therefore enjoy broad discretion to "repeal or extend a statute of limitations, even after [the] right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." *Id.* at 311-12.[12] Like a statute of limitations itself, a judgment resting on a statute of limitations is not "fundamental" and is not immune from legislative reopening. As this Court stated in *Paramino Lumber*, "the

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[12] As Petitioners point out, in *Chase*, this Court noted that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor." 325 U.S. at 310. As discussed in the Section I.B, *supra*, however, this Court has upheld other statutes divesting parties of rights acquired in a final judgment. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100 (1947); *Pennsylvania v. Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421, 431 (1855); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). Accordingly, that dictum in *Chase* thus does not support Petitioners' position.

immunity obtained by the lapse of the time for review is [not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." 309 U.S. at 378.[13]

Since any property right Petitioners and the others who received a windfall from retroactive application of the *Lampf* rule had in a judgment based on the statute of limitations was not "fundamental," Section 27A(b) survives due process scrutiny so long as it is rationally related to a legitimate government interest. *See Pension*

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[13] Petitioners and other defendants similarly situated cannot tenably argue that they relied to their detriment on these judgments. At the time of the conduct underlying these suits, the statues of limitations were longer, and Petitioners and other defendants ordered their affairs accordingly. The time period between the retroactive application of the *Lampf* rule and Congress' enactment of Section 27A was only a few months. During that time period, Petitioner and other defendants were aware that Congress was considering legislation as a result of the retroactive application of the *Lampf* rule, and knew that pursuant to Fed. R. Civ. P. 60(b) courts might void their windfall judgments based on the new legislation.

Petitioners' contention that their judgment based on the retroactive application of *Lampf* was specifically intended by this Court, and thus not a "windfall," is not accurate. In *Lampf*, this Court applied a uniform federal statute of limitations for Section 10(b) claims to the litigants before the Court. In *Beam*, this Court held that *courts* should not engage in selective prospectivity; this Court *did not hold that litigants in pending cases should not be exempt from the effect of a new statutory interpretation*, simply that it was *not proper for courts* to make that determination or to engage in the process of deciding when selective prospectivity is appropriate. Congress' enactment of Section 27A, and the result Section 27A achieves, are fully consistent with the *Lampf* and *Beam* decisions.

Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984) ("the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As discussed below, Section 27A(b) was not only rational, but compelled by justice and equity.

B. Section 27A(b) Easily Passes Rational Basis Scrutiny.

"Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Section 27A(b) was rationally designed to protect the legitimate interests of securities fraud victims who filed suit before the *Lampf* decision in reliance on the then-accepted statute of limitations, *see* 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (Senator Riegle), and to prevent an undeserved windfall for culpable parties by restoring the status quo prior to *Lampf* and confirming the expectations of the parties.[14]

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[14] Congress was also legitimately concerned with the adverse impact of *Lampf* and *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) upon private enforcement of the securities laws. *See Securities Investor Protection Act of 1991: Hearings on S.1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102nd Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden,

As discussed in Section I.A. above, Section 27A(b) was far more than rational. It was a meaningful legislative response to a compelling social and economic problem. Section 27A(b) counteracted a windfall that retroactive application of *Lampf* temporarily provided culpable defendants, and alleviated unfairness to victims of fraud, including those who had the misfortune to have judges quickly apply *Lampf* retroactively in their cases and who decided that filing an appeal was not appropriate. It made our financial markets more stable and secure.[15]

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), this Court held that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Petitioners cannot come close to meeting that burden with respect to Section 27A.[16]

Chairman, SEC); *Securities Investors' Legal Rights: Hearings on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102nd Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breedon); *id.* at 21-24 (Chairman Breeden); *cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 230-231 (1988) (private suits are "an essential tool for enforcement" of the Securities Exchange Act).

[15] The Fifth Circuit was thus correct in finding "that § 27A(b) should survive any heightened scrutiny," if such scrutiny were required, but concluding that it need not survive heightened scrutiny, simply rational basis review. *See Pacific Mutual Life Ins. Co. v. First Republicbank*, 997 F.2d at 51 n.14 (5th Cir. 1993).

[16] The circuit courts that have reviewed Section 27A have concluded that Section 27A easily passes rational basis review. *See, e.g., Anixter v. Home-Stake Production Co.*, 977 F.2d 1533, 1546 (10th Cir. 1992); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1574 (11th Cir. 1992); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570, 1573-74 (9th Cir. 1993).

CONCLUSION

The enactment of Section 27A(b) was a proper exercise of Congress' legislative authority. Congress amended this nation's statutory law to prevent unfairness and injustice caused by the retroactive application of a new judicial rule.

Nothing in the Constitution or in this Court's decisions makes that legislative act violative of separation-of-powers principles or of due process. Accordingly, this Court should affirm the Fifth Circuit, and uphold Section 27A(b) as constitutional.

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Respectfully submitted,

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